No. 15664

United States
Court of Appeals
For the Ninth Circuit

WALTER HERBERT MACARTNEY,

Appellant,

vs.

COMPAGNIE GENERALE TRANSATLANTIQUE,
a corporation,

Appellee.

Brief of Appellant

Appeal from the United States District Court for the District of Oregon.

HON. GUS J. SOLOMON, Judge.

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Upon Appeal from the District Court of the United States for the District of Oregon.

STATEMENT OF JURISDICTION

This is an action at law for personal injuries between a longshoreman and citizen of the State of Oregon and a foreign corporation existing under the laws of France (T. 3, 4) in which the appellant claims damages of more than $85,000.00 for a maritime tort against appellee corporation. (T. 3, 4). A final judgment in favor of appellee and against appellant, based upon the verdict of a jury, was filed on April 24, 1957, and this appeal

was thereafter seasonably perfected (T. 16, 17), and bond for costs on appeal filed. (T. 199, 200). It is contended that the United States District Court for the District of Oregon had jurisdiction of this action on the basis of the above facts under 28 U.S.C.A., Sections 1331, 1332, sub. 2, and 1333, sub 1; and that the United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal under 28 U.S.C.A., Sections 1291 and 1294. (T. refers to Transcript of Record.) (Blackface type where used are supplied by appellant.)

STATEMENT OF CASE

The admitted facts in this case, as set out in the Pretrial Order (T. 3, 4, 5), show:

1. Appellee was and now is a foreign corporation existing under the laws of the Republic of France; it had and now has a Pacific Coast agent and maintains a regular sailing schedule of its vessels to and from the port of Portland, Oregon.

2. That at all material times this appellant was and now is a citizen of the United States and lived and resided in and still has his residence and domicile in Portland, Oregon, and this controversy involves a cause for more than $3,000.00 damages.

3. That at all times hereinafter mentioned the M/S WYOMING was and is a French motor ship, in the possession of and owned, operated and employed by de-

fendant corporation in maritime commerce, as a passenger and merchant vessel between points in Europe and points in the United States of America.

4. That on or about October 10, 1954, the appellee had a stevedoring contract with the Oregon Stevedoring Company, an Oregon corporation, to act as stevedores for appellee's vessels, including the M/S WYOMING at Portland, Oregon.

5. That on or about and prior to October 10, 1954, appellant was regularly employed by said Oregon Stevedoring Company as a longshoreman to assist in unloading cargo on said vessel as aforesaid at Portland, Oregon, and at the time of the occurrences hereinafter mentioned, the appellant was engaged in the performance of his regular duties and in the course of his regular employment with said Oregon Stevedoring Company, working on board such vessel and in connection with unloading such cargo, while such vessel was moored and docked on navigable waters.

6. That in the afternoon of October 10, 1954, appellant was working in No. 4 hold of said vessel in connection with unloading cargo consisting of heavy crates of glass which were moved on a certain hand operated, 4-wheeled dolly, which had been furnished by and were being used by said Oregon Stevedoring Company and its employees.

8. Appellant has elected to pursue a remedy against defendant pursuant to the Longshoremen and Harbor Worker's Compensation Act of the United States and has filed with the United States Department of Labor, Bureau of Employees Compensation at Seattle, Washington, a notice of his election to sue.

The evidence shows that appellant and another longshoreman had moved a crate of glass into the square of the hatch of No. 4 hold, and that such crate of glass was left sitting in the square of the hatch while appellant and another longshoreman then took the 4-wheeled dolly into the wing of the hatch and placed another crate of glass weighing about 1500 pounds on said dolly, and then moved the dolly over to near the square of the hatch and left the crate standing on the dolly, just a few feet back of the crate that had been left in the square of the hatch, and parallel with the hatch and such crate. Then appellant stepped in front of the crate of glass on the dolly that was sitting unattended and had his back to it while he faced the shore and started to assist another longshoreman in hooking up the crate of glass that was then sitting in the square of the hatch. While he was doing this, the dolly with the crate of glass on it which was behind him tipped towards inshore and thereby suddenly percipitated the large crate of glass then on such dolly and weighing about 1500 pounds, upon appellant from be-

hind, and the crate of glass fell upon both of his legs, a little below each knee. (T. 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 49, 53, 68, 69, 76, 100 to 109 inclusive).

The witness Foster and other witnesses of appellant also identified a picture of the same type of dolly used when appellant was injured. (Appellant's Ex. 3-B, T. 31, 32, 33, 51, 63, 74, 102, 119).

Witness Henry L. Foster testified **that the dollies used since the accident were made bigger and wider, and that makes them harder to tip over when loaded with a crate of glass.** (T. 49).

Several of appellant's witnesses testified to the effect that there was a noticeable and substantial inshore list existing on the ship before and after appellant was injured (T. 29, 30, 31, 34, 35, 37, 58, 59, 64, 65, 78, 106, 107, 108, 109).

Several of appellant's witnesses also testified that it was the customary and usual practice and procedure to put a crate of glass out in the square of the hatch and leave another crate of glass sitting on a dolly behind the longshoremen while slinging out the crate in the hatch. (T. 109, 117, 119, 82, 83, 84, 39, 40).

Dr. Howard L. Cherry testified about the serious and permanent injuries appellant received as a result of this crate of glass crushing both of his legs. (T. 85 to 100 inclusive).

Appellant testified as to his injuries, disability, loss of substantial earnings, and how he was injured. (T. 115 to 128 inclusive). His wife testified about his good health before he was hurt and his disability afterwards. (T. 114).

Edwin C. Davis, appellee's expert witness, who is president of Oregon Stevedoring Company, testified on cross-examination:

> "Q. How much would the heaviest case of glass weigh that they moved on these dollies?
>
> A. I couldn't answer offhand without checking the records.
>
> Q. **Well, would it be as much as a ton?**
>
> A. **Oh, no; we couldn't—you couldn't handle that much on one of those dollies safely.**
>
> Q. 2,000 pounds?
>
> A. What?
>
> Q. **Could you handle 1,000 pounds?**
>
> A. **I imagine you could get away with a thousand pounds all right, but it's more likely they run around 600."** (T. 155).

The specifications of unseaworthiness that the court instructed the jury on are set out in the instructions (T. 163) and are as follows:

> "In plaintiff's claim based upon contract he asserts that the motorship operated by the defendant was unseaworthy in two respects: **First,** in permitting to be used and in using a dangerous and unsafe and unseaworthy dolly or hand truck as

part of the regular gear, appliances and equipment used on said vessel. That is what the plaintiff contends first. Plaintiff's second contention is that the vessel was unseaworthy in causing too much cargo to be unloaded from one part of the ship at one time, thereby causing the ship to lurch, careen, tilt, slant, lean, and heel over. That is what plaintiff claims as his second ground."

* * * *

"The specifications of negligence (T. 166) upon which plaintiff must recover, if at all, are as follows:

"First, in permitting to be used and in using a dangerous and unsafe and unseaworthy dolly or hand truck as part of the regular gear, appliances and equipment used on said vessel; and,

"Second, in causing too much cargo to be unloaded from one part of the ship at one time, thereby causing the ship to lurch, careen, tilt, slant, lean, and heel over."

"These specifications, as you will note, are the same specifications alleged by the plaintiff to have rendered the ship unseaworthy. He asserts that they also constitute negligence."

* * * *

"In this connection, I instruct you that the owner or operator of a vessel is under a duty to provide safe gear and equipment and a safe working place for all stevedoring operations on board ship. But, here again, I want to call your attention to the fact that a ship is not an insurer of the safety of all persons using its facilities and that the standard required of the defendant is not absolute safety but reasonable safety." (T. 166, 167).

After all the evidence was in and both parties had rested, the appellee moved for a directed verdict upon the ground that there was no substantial evidence to support any of the charges of unseaworthiness, and on the second ground that there was no substantial evidence to support any of the grounds of negligence charged in the complaint. The trial judge reserved ruling upon such motion. (T. 158, 159).

The court instructed the jury upon the theory of negligence and also upon the theory of unseaworthiness as heretofore indicated, and the jury retired to deliberate upon its verdict at approximately 3:00 o'clock p. m. on April 24, 1957.

Thereafter, at about 6:00 o'clock p. m. of the same day, the jury foreman notified the trial judge that the jury could not agree upon a verdict. The trial judge thereupon had the jury come back into his court room, without notifying counsel for appellant or appellee of such proceedings, and counsel not having waived the right to appear, the trial judge thereupon proceeded to give supplementary instructions to the jury, in the absence of the parties and their respective attorneys and without affording them an opportunity to be present and make any objections to any portions of such supplementary instructions. On May 21, 1957 the trial judge admitted he was in error concerning both counsel not waiving their presence at the time such additional in-

structions were given. (T. 184 to 191 inclusive, 194, 195).

After receiving these additional instructions, the jury again retired, and at approximately 8:30 p. m. of the same day returned into court with a verdict in favor of the appellee, and judgment thereon was filed on April 24, 1957.

Appellant contends that the trial judge committed prejudicial and reversible error in making such additional instructions to the jury under such circumstances; that he also erred in failing to instruct the jury as to the amount and measure of appellant's damages as requested by appellant and excepted to; that the trial judge further erred when he instructed the jury in such additional instructions that they should be convinced and decide beyond a reasonable doubt; and further, in such additional instructions, the trial judge incorrectly stated the law as to the test of seaworthiness that "the test of seaworthiness is not perfection, but what a reasonably prudent person would have done under all the circumstances," and such trial judge further erred by giving additional instructions that were conflicting with his original instructions to the jury.

SPECIFICATIONS OF ERROR NUMBER ONE

1. That the trial court erred in giving supplementary instructions to the jury after the jury had been out approximately three hours and could not agree on a verdict, which supplementary instructions were given in the absence of the parties and their respective attorneys who were not notified of such proceedings, and without affording them an opportunity to be present, and to make any objections to any portions of such supplementary instructions.

The supplementary instructions (T. 184, 185, 186, 187, 188, 189, 190, 191) complained of in this case are as follows:

(The jury having been duly instructed by the Court in the above-entitled cause, and having retired at 3:00 P.M. for deliberation on their verdict and returning to the courtroom at 6:00 P.M., the following proceedings were had:)

THE COURT: Ladies and Gentlemen of the Jury, I understand the jury is in disagreement. Who is the foreman?

MR. HERMAN J. FOELLER: I am, your Honor.

THE COURT: Is it correct that the jury is in disagreement?

MR. FOELLER: That is correct.

THE COURT: Is there any instructions I gave that was not clear and which you would like to have repeated?

MR. FOELLER: I think the instruction if you find negligence in the hold of the ship where it is imputed on down to the steamship itself, if that is clarified we could reach a decision. We are a little confused that there may have been some negligence down there by the employes, and the opinion is that because they were a stevedoring company and so on, down to the French Line itself.

THE COURT: Let me just say this to you, and what I am going to say now must be considered in the light of the instructions which I previously gave you. Ordinarily, I do not like to give one instruction because it lays greater emphasis on it, but I think what I said before and what I repeat now is the test of what a reasonable person would have done under the same or similar circumstances. In other words, negligence is defined as the doing of an act which a person of ordinary prudence would not have done under the same or similar circumstances or the failure to do an act which a person of ordinary prudence would have done under the same or similar circumstances.

There are two grounds upon which the plaintiff claims that the ship was at fault: One, in permitting to be used and in using a dangerous, unsafe, and un-

seaworthy dolly or hand truck as part of the regular gear, appliances, or equipment used on the vessel.

In other words, in order to find for plaintiff you have to first find that this dolly was unsafe and unseaworthy, or, in the alternative, if you find that the ship caused too much cargo to be unloaded from one part of the ship at one time, thereby causing the ship to lurch, careen, tilt, slant, lean and heel over. In order to find for plaintiff you have to find that one of these two things which were proved by the plaintiff caused or participated in causing the accident.

If the acts of the employes of the Oregon Stevedoring Company were solely responsible for the accident, or if the plaintiff himself did something, one or more things, for instance, failing to keep a proper lookout or leaving the dolly unattended with the glass on it, if you find that that is solely the cause of the accident, then you would return a verdict in favor of the ship.

You would return a verdict in favor of Mr. Macartney, the plaintiff, if you found that the dolly was defective or if the ship was leaning, and as a result of that he suffered this accident.

It is also true that if the ship was negligent and if Mr. Macartney was negligent and the negligence of both combined to cause the accident, then you would

allow plaintiff to recover, but you would reduce the damages.

Has that helped you any?

MR. FOELLER: It has helped me some.

MR. KESWICK: It has helped me plenty.

THE COURT: I want to suggest a few thoughts which you may consider in your deliberations along with all the evidence and all the instructions which I previously gave you.

I know that you have been deliberating now for some time. This is an important case, and the trial, while it has not been long, it has been expensive for both sides, and if you fail to agree upon a verdict the case is left open and undecided. Like all cases, it must be decided sometime, and there appears no reason to believe that the case can again be better tried or more exhaustively tried. As I told you, the case was presented by two very competent lawyers, both of whom knew their business. Any future jury must be selected in the same manner and from the same source as you have been chosen so there appears no reason to believe that the case would be submitted to twelve men and women more intelligent, more impartial, or more competent to decide it or that clearer evidence can be produced on behalf of either side.

Of course, these matters suggest themselves, upon

brief reflection, to all of us who have sat throughout this trial. The only reason I mention them is because some of them may have escaped your attention because you may have been devoting your time to a review of the evidence and the law.

I think I told you before that I do not expect anyone to surrender an honest conviction as to the weight or effect of evidence solely because of the opinion of other jurors or solely for the purpose of returning a verdict. I do not think a person should do that; however, I think I told you just before the conclusion of my remarks that it is your duty to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but you should do so only after a consideration of the evidence with your fellow jurors, and in the course of your deliberations you should not hesitate to change your opinion when convinced that it is erroneous. In order to bring twelve minds to a unanimous result, you must examine the questions submitted to you with candor and frankness and with proper deference to, and regard for the opinions of the other jurors. That is to say, in conferring together each of you should pay due attention and respect to the views of others and listen to each other's arguments with a disposition to re-examine your own views. If much the greater number of you are

for the plaintiff, each dissenting juror ought to consider whether a doubt in his or her mind is a reasonable one since it makes no effective impression upon the minds of so many equally honest, equally intelligent fellow jurors who bear the same responsibility, serve under the same sanction of the same oath, and have heard the same evidence with the same attention, with an equal desire to arrive at the verdict.

On the other hand, if a majority of even a lesser number are for the defendant, other jurors ought to consider, to ask themselves again whether they have reason to doubt the correctness of a judgment which is not concurred in by many of their fellow jurors and **Whether they should not distrust the weight or sufficiency of evidence which fails to convince the minds of several of their fellows beyond a reasonable doubt.**

I think that while one juror, if he is convinced that all the rest of them are wrong, may hold out, and should, but the greater number who are on one side, the more those dissenting jurors should re-examine their views to see whether there is a rational basis for the opinion which they hold when other jurors or so many other jurors are of the contrary opinion. I think in other cases I have told you, those of you who have served, that you are not partisans. You are judges, judges of the facts, and your sole purpose is to ascertain the truth from the evidence before you. You are the sole and exclusive

judges of the credibility of all witnesses and the weight and effect of evidence, and in the performance of this high duty of jurors you are at liberty to disregard all comments of the judge as well as the attorneys, including of course the remarks which I am now making.

I hope you will remember that no juror is expected to yield the conscientious conviction which he or she may have as to the weight or effect of evidence, but remember also that after a full deliberation and consideration of all the evidence it is your duty to agree upon a verdict if you can do so without violating your individual judgment and conscience.

It is 6:15. If you want to go back and deliberate now, that is fine. If you want to go out to dinner, that is perfectly all right, and you can then deliberate later. I am not trying to rush you. You can deliberate as leisurely as you want. I am hopeful that you can arrive at a judgment if you can do so without violation of your individual conscience, but again I want to say that I am going to leave it up to you.

What do you want to do about it?

MR. FOELLER: We will go back upstairs.

THE COURT: Is there any question, Mr. Kniss?

MR. KNISS: Yes, your Honor. If I understand you properly now, it is a decision that even though we find the plaintiff——what do I want to say here——negli-

gent and the steamship both negligent to some degree, we still can allow damages or some of that?

THE COURT: That is right. If you find that the steamship company did something they should not have done or failed to do something they should have done, you can find for plaintiff even though you find that the plaintiff did something he should not have done, and under these circumstances you apportion the damages.

MR. KNISS: That is right.

THE COURT: But if you find that the stevedoring company was solely responsible for the accident or if you find that the plaintiff was solely responsible for the accident, you may not return a verdict in favor of the plaintiff. If you find, however, that the steamship company did something that it should not have done and what it did caused the plaintiff's accident and the plaintiff was free from negligence, then you give the plaintiff the full amount of damages. Do I make myself clear on that?

MR. KNISS: I think that is the main point that was holding us up.

MR. CHRISTAL: There are only two points we can judge on; that is, the equipment and the rocking of the boat?

THE COURT: That is all. You cannot consider anything else. I just want to answer your questions. You

can only consider those two things that the plaintiff has specified. You cannot consider any other ground of negligence not raised, that I did not instruct you on, even though you think that the company was negligent in that respect or even though you might think that the plaintiff was negligent in some respect not designated. Mrs. Hruby?

MRS. HRUBY: Could you please give us a definition or the word "defective."

THE COURT: "Defective" in this instance would be a piece of equipment which a reasonably prudent person would not have maintained. It does not have to be a perfect piece of equipment. I think I explained that to you. The test of seaworthiness is not perfection but what a reasonably prudent person would have done under all the circumstances.

(Thereupon the jury retired for further deliberation.)

Thereafter the trial judge admitted that he was in error when he learned that both counsel did not waive their presence at the time such additional instructions were given, and in the absence of counsel (T. 194, 195).

ARGUMENT

In the case of **Fillippon v. Albion Vein Slate Co.,** 1919, 250 U.S. 76, at page 81, 39 S.Ct., 435, at page 436, 63 L.Ed. 853, which case involved an action for damages for personal injuries, the Supreme Court said:

> " We entertain no doubt that the orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings from the time the jury is empaneled until it is discharged after rendering the verdict. Where a jury has retired to consider their verdict, and supplementary instructions are required, either because asked for by the jury or for other reasons, they ought to be given either in the presence of counsel or after notice and an opportunity to be present; and written instructions ought not to be sent to the jury without notice to counsel and an opportunity to object. Under ordinary circumstances, and wherever practicable, the jury ought to be recalled to the courtroom, where counsel are entitled to anticipate, and bound to presume, in the absence of notice to the contrary, that all proceedings in the trial will be had. In this case the trial court erred in giving a supplementary instruction to the jury in the absence of the parties and without affording them an opportunity either to be present or to make timely objection to the instruction."

In the case of **Arrington v. Roberson,** 1940, 114 F. 2d 821, 822, the question presented was:

> "Whether it was reversible error for the trial

judge, in the absence of counsel for the parties and without notice to them, to send instructions in writing to the jury, pursuant to an inquiry by them, after they had retired from the courtroom and while they were in the jury room deliberating upon their verdict."

Holding that the accuracy of the instructions as abstract statements of the law was immaterial, the court said at page 823:

> "The action of the trial judge in the present case in sending instructions to the jury from his chambers in the absence of the defendant or his counsel and without giving them notice and an opportunity to be present amounted to a denial of due process of law. We hold that it was the denial of a right so fundamental as necessarily to affect the substantial rights of the defendant regardless of the nature or propriety of the instruction given. The inquiry of the jury and the trial judge's response were not reported by the court stenographer. The record does not disclose the phraseology of the jury's question. Consequently we cannot know whether the instructions given, even though entirely sound as abstract legal statements, were appropriate to answer it, or whether additional instructions, appropriate and indeed necessary to supplement those given, might not have been suggested to the trial judge by counsel for the defendant if he had been given the oportunity to be present."

It may be noted parenthetically that in **Arrington v. Robertson,** supra, we observed (at page 823) with reference to the Fillippon case:

"While the Supreme Court in the Fillippon case also pointed out that the additional instructions given were actually erroneous, its decision in the case appears to have been rested primarily on the manner in which the instruction was given."

In the case of **Snyder v. Lehigh Valley Railroad Co.,** 245 F. 2d 112, decided June 5, 1957, by the United States Court of Appeals for the Third Circuit, involved an action for injuries sustained by a railroad employee under the Federal Employee's Liability Act. In that case the jury sent inquiry from the jury room asking whether the employee-plaintiff received workman's compensation. The judge should have stated to the jury in the presence of counsel that such was not an issue in the case, and the court's conduct in submitting a negative response, upon the erroneous assumption that plaintiff had injected such an issue in the case, without notice to or knowledge of counsel, was error with such strong possibilities of prejudice as to require reversal of judgment rendered for defendant, notwithstanding verdict finding neither party guilty of negligence but awarding plaintiff damages.

In its opinion, the court held that plaintiff's contention that the trial judge erred with respect to his supplementary oral instructions to the jury in the absence of counsel was supported by the decided cases. The court then went on to quote and cite with approval from **Fillippon v. Albion Vein Slate Co.,** supra; **Arrington v.**

Robertson, supra; and also cited with approval the case of **Parfet v. Kansas City Life Ins. Co.,** 10 Cir. 128 F. 2d 361, 362, certiorari denied 1942, 317 U.S. 364, where it was held that reversible error was committed even though substantial prejudice is not affirmatively shown, where additional instructions are given by the trial judge to the jury in the absence of their counsel. And the court also went on to say that in the case of **Fillippon v. Albion Vein Slate Co.,** supra, that the Supreme Court held that such instructions were presumptively injurious, furnishing ground for reversal unless it appears that they were harmless. The judgment of the District Court was reversed, with instructions to proceed in accordance with the opinion of the appellate court.

The case of **Ah Fook Chang v. United States,** 91 F. 2d 805 (C.A. 9th Cir. 1937) was a criminal case decided by this Court of Appeals, where the foreman of the jury came to the chambers of the trial judge for further instructions in the presence of counsel and in the absence of the clerk and court reporter, and the judge gave the foreman a further instrution. Thereupon, the foreman retired and a few moments later the jury returned to the court room with a verdict against both defendants on a narcotic drug charge.

At page 810 of the opinion this court says:

> "The second ground of reversal is because of the communication by the court to the jury. It is

error for the court to instruct or communicate with the jury in the absence of counsel and without notice to them."—(citing **Fillipon v. Albion Vein Slate Co.,** supra, and other cases).

"Not all error, however, is reversible error. If the record shows affirmatively that the appellant was prejudiced, there is reversible error. Fillipon v. Albion Vein Slate Co., supra. On the other hand, if the record shows affirmatively that appellant was not prejudiced, then the error does not require reversal. * * * Finally, if the record shows error, but does not disclose whether the error is prejudicial or whether it is not prejudicial, it is presumed to be prejudicial and to require reversal. Little v. United States (C.C.A. 10) 73 F. 2d 861, A.L.R., 220, Annotation."

Continuing, from page 810, this court says:

"The instant case is not one where the whole jury was instructed directly by the court either orally or in writing. By instructing one juror to instruct the rest of the jury, the instruction was in fact given to the jury in the absence of appellants, their counsel and out of court, for the juror relaying the instruction would necessarily have done so in the jury room. On that theory reversal is required * * *. Further, we have the case where no one knows what the juror told the rest of the jury. If he repeated correctly the judge's instruction, the error would not be prejudicial. If he did not, the error may have been prejudicial. Little v. United States (C.C.A. 10 supra. * * * Presuming the error to be prejudicial, the rule in Fillippon v. Albion Vein Slate Co., supra, is applicable and requires reversal." Reversed and remanded for a new trial.

It will be seen from the facts involved and the foregoing authorities, that the trial judge in the case at bar in giving such supplementary instructions to the jury did commit error, and that such error is prejudicial and reversible, which is plainly shown by the context of the supplemental instructions. For example, when the court instructed the jury to the effect that they should be convinced and decide beyond a reasonable doubt, which is certainly conflicting with the court's original instructions which he gave the jury upon the theory of preponderance of the evidence. Such an instruction puts a greater burden upon the appellant than the law requires, which proposition I have set forth in a separate specification of error and will devote further argument thereto later in this brief. This is brought up merely for the purpose of illustration at this time in view of the holding of the Supreme Court in **Fillipon v. Albion Vein Slate Co.,** supra, and this court in the **Ah Fook Chang v. United States,** supra, cases.

SPECIFICATION OF ERROR NUMBER TWO

In connection with such supplementary instructions, the trial court erred in emphasizing and restating certain portions of the court's former instructions favorable to the appellee as to the non-liability of the appellee in this cause. (T. 202).

After further investigation and research upon the

foregoing proposition, appellant does not believe such point is well taken, and now waives same.

SPECIFICATION OF ERROR NUMBER THREE

That the trial court erred in failing to instruct the jury correctly as to the amount and measure of damages involved in this case, as requested by appellant in his requested instruction number VIII. (T. 17, 18). Said instruction number VIII is as follows:

VIII.

"If you find on the instructions given you, from a preponderance of satisfactory evidence, that Mr. Macartney, the plaintiff, is entitled to a verdict at your hands, and will award to him such an amount of money as will adequately compensate him for his injuries and damages, bearing in mind that the burden is on the plaintiff to establish by a preponderance of satisfactory evidence the nature and extent of his injuries and damages.

"In awarding damages, if any, you will take into consideration the nature and extent of his injuries, and which of such injuries are temporary or permanent in character, his pain and suffering endured, and which he will endure in the future, if any, as a proximate result of the accident; his mental anguish, if any, any future loss of earnings he will sustain resulting from this accident, and then allow plaintiff whatever sum you find, from a preponderance of the evidence, to be adequate, reasonable, and proper, and within the confines of my instructions, not exceeding $85,000.00, the

amount demanded by plaintiff in this case as general damages.

"In connection with this subject of damages you may also allow Mr. Macartney certain additional or special damages, if any, for reasonable expenditures incurred for medical and surgical care, hospitalization, for costs of X-Rays, and loss of earnings, as a longshoreman, if any, that Mr. Macartney sustained up to the time this case was tried, and then allow him whatever sum you find, from a preponderance of the evidence, to be adequate, reasonable, and proper, and not exceeding the sum of $9,963.40 claimed by Mr. Macartney as special damages in this case."

The trial judge instructed the jury (T. 173, 174, 175, 176) in regard to the measure of damages as follows:

"If you find, under the instructions that I have already given you, the plaintiff is entitled to recover, you will consider the question of damages. The fact that I am instructing you on the question of damages does not mean that I am or am not of the opinion that plaintiff is entitled to recover in this case because on that issue, while I am expressing no opinion one way or the other, I am going to leave it up to you to determine.

"Damages, like every other proposition, must be proved by a preponderance of the evidence on the part of the person having the burden of proof, and the plaintiff on that issue has the burden of proof. In assessing damages, you should take into consideration the injuries which the plaintiff has sustained, the pain and suffering which he has

endured, and the pain and suffering which he will endure in the future, if you find that he has and will endure pain and suffering. You should take into consideration any permanent disability which plaintiff has sustained as shown by the evidence, any loss of power in performing labor, any impairment of the ability to earn money considering his pasition and station in life — and generally, Ladies and Gentlemen, you should give him such amount as, under the evidence in this case, will reasonably compensate plaintiff for pain and suffering and injuries, past, present and future.

"Plaintiff contends that he has been permanently injured, and I think that the evidence is clear that he has sustained permanent injury and disability. If you find in favor of the plaintiff in this case, you can take into consideration his life expectancy. Plaintiff is 45 years of age, and, under the standard mortality tables, he has a life expectancy of 24.54 years. That is about 24½ years. The fact that he has this life expectancy does not mean that he will live that long, or that he will not live longer. Neither does it mean that he will be employed and earning during this entire period. However, it is one factor that you can take into consideration along with evidence of his age, sex, health, habits, and the nature of his occupation, to determine what his actual life expectancy will be. You will then take into consideration whether plaintiff's injuries permanently offect his ability to work or follow his occupation.

"He claims that as a result of his injuries he has lost $8,000 in wages to date, and in the event you find in favor of plaintiff you may allow him

such sum as has been proved by the evidence, not exceeding the sum of $8,000.

"He claims that he has spent $1,989.04 for the reasonable value of medical and hospital expenses. If you find for him, he would be entitled to that amount as well.

"Your decision with reference to the amount of damages must be reached and founded upon an unprejudiced consideration of all the facts and without any sympathy, prejudice or desire to punish anyone, and without any thought of plaintiff's financial condition or the defendant's ability to pay.

"If you find that plaintiff, although entitled to recover, was guilty of some act of negligence which contributed to the accident, then you will reduce the amount of damages which you found in proportion to the negligence of the respective parties. For example, if you find that the plaintiff was contributorily negligent and that such negligence was responsible for 25 per cent of his accident and injuries, then you will reduce the amount of damages by 25 per cent, and you will award plaintiff 75 per cent of the recovery which you would have given him if he, himself, had not been guilty of negligence. Now this 25-per cent figure is just by way of example. If you find he was 50 per cent contributorily negligent, you would cut the damages in half. You would first find out what he would be entitled to if no negligence occurred on his part, and if he was 50 per cent negligent you would cut that award in half. If he was 25 per cent negligent you would give him three-quarters. If he was 75 per cent negligent you would only give him

one-quarter. That is the way you do that. The amount of damages which you put in the verdict is the amount plaintiff has and will sustain after the reduction, if any, and that will be the amount of your verdict. You do not put a full amount in the verdict if you find that he is guilty of contributory negligence. You put in an amount after the deduction, if any."

Appellant excepted (T. 179, 180, 183) to the failure of the trial judge to give such requested instruction as follows:

MR. CONWAY: "Your Honor, I think that maybe the Court overlooked the matter of instructing in connection with the amount of damage or the theory of damage involved here because, as I get the impression from your instructions, you spoke about $8,000 as the money that the plaintiff lost up to the time of trial, and you had $1,989.04, whatever it was, also hospital and doctor bills and what have you, and then I didn't hear you say anything about his future loss of earnings or how much damages the jury could allow him if they thought he was entitled to damages. I think we were suing for $85,000 for general damages, for example, and then we had about $8,000 special———

THE COURT: "I said, 'In assessing damages, you should take into consideration the injuries plaintiff has sustained, the pain and suffering which he has endured, and the pain and suffering which he will endure in the future, if you find that he has and will endure pain and suffering. You should also take into account any permanent disability which the plaintiff has sustained as shown by the

evidence, and any loss of power in performing labor, any impairment of the ability to earn money, considering his position and station in life — and generally, Ladies and Gentlemen, you should give him such amount as, under the evidence in this case, will reasonably compensate plaintiff for pain and suffering and injuries past, present and future.'

MR. CONWAY: "Yes, that is right, Judge, but the thought I had in mind was this: I do not want you to misunderstand me. The jury might get the impression when you do not mention any sum there in that connection that they would have to find, for example, say for $10,000.

THE COURT: "I will take care of that.

MR. CONWAY: "Because they might say———

THE COURT: "I will tell them."

THE COURT: "I want to call your attention once again to the verdicts.

"If you find in favor of plaintiff, you will put in that blank space the amount of damages to which you believe plaintiff is entitled, and in that figure you would put in the special and general damages. In other words, you cannot allow more than $8,000 for loss of wages and more than $1,989.04 for medical expenses. That is for the special damages. In addition to that amount, of course, you would allow him such sum as you believe plaintiff is entitled to for the pain and suffering and the injuries which he has sustained and about which I instructed you at considerable length. In that one figure

you take into consideration the general damages as well as the special damages, and then you reduce it by the amount which you find plaintiff has been guilty of contributory negligence."

ARGUMENT

Appellant contends that he is entitled to have a full and complete presentation of his claim and the theory of his case outlined to the jury by the trial judge in his instructions to the jury in the case at bar.

The case of **McDermott v. Severe,** 202 U.S. 600, 26 S.Ct. 709, 50 L.Ed. 1162 was an action to recover damages for personal injuries sustained by an infant who was run over at a railway crossing in Maryland, the railroad being in charge of the defendant, operating same as a receiver. A verdict and judgment resulted in favor of the plaintiff. Error was alleged in that the trial judge charged the jury that damages could not be recovered in excess of the sum claimed in the plaintiff's declaration, and that the sum claimed should not be taken as a criterion to act upon, but that it was only a limit, beyond which the jury could not go.

The Court of Appeals of the District of Columbia had affirmed the judgment of the lower court, and thereupon an appeal was taken to the United States Supreme Court. Among other alleged errors, which were overruled, the Supreme Court, in referring to the foregoing

instruction relative to the amount of damages involved said:

> "We cannot see how the plaintiff in error (defendant receiver) was prejudiced by this instruction."

and affirmed the judgment of the Court of Appeals. 50 L.Ed. 1162, at 1169.

Chesapeake & Ohio Railway Company v. Carnahan, 241 U.S. 241, 36 S.Ct. 594, 60 L.Ed. 979, was a case in error to review a judgment in favor of the original plaintiff based upon a verdict for $25,000 damages for injuries sustained through the asserted negligence of the defendant under the Federal Employers Liability Act. In its opinion, the Supreme Court, at 60 L.Ed. 981, says:

> "The instruction which is the basis of the second assignment of error is as follows:
>
> 'The Court instructs the jury that if they believe from a preponderance of the evidence that the defendant is liable to the plaintiff in this action, then in assessing damages against the defendant, tney may take into consideration the pain and suffering of the plaintiff, his mental anguish, the bodily injury sustained by him, his pecuniary loss, his loss of power and capacity for work and its effect upon his future, not however, in excess of $35,000, as to them may seem just and fair.' * * *
>
> "It is objected that the instruction directed the jury that the damages might be in such sum not in excess of $35,000 as to them might seem just

and fair. By the instruction the Court called the attention of the jury to a certain sum and gave judicial approval of it, giving them to understand that they could give such sum as they might deem just and fair, without regard to the damages the evidence might prove."

Continuing, in its opinion, at 60 L.Ed. 982, the Court says:

"Is is also objected that the instruction 'allowed the jury to indulge in speculation and conjecture; invited their attention to the sum of $35,000, and allowed the jury to give such sum as damages as to them might "seem just and fair" without stating that the damages could be only such as were proved by the evidence to have proximately resulted from the negligent act complained of'.

"The objection is untenable. As we have seen, the Court explicitly enjoined upon the jury that there must be a proximate and casual relation between the damages and the negligence of the company, and the reference to the sum of $35,000 was a limitation of the amount stated in the declaration. There could have been no misunderstanding of the purpose of the instruction."

The Court then affirmed the judgment of the lower court.

Hoffschlaeger Co. v. Fraga (1923; CCA9th) 290 F 146, was an action to recover damages for personal injuries resulting from a fall through an open elevator shaft in a public sidewalk on one of the streets of Hilo,

in Hawaii. The jury returned a verdict for the plaintiff, and a judgment was entered thereon, from which the defendant appealed to this Court of Appeals.

At 290 F, page 148, this Court says:

> "Nor was there error in the charge of the court. The chief point of attack is to the statement in the charge that the amount of the verdict could not exceed the amount claimed in the complaint. Such an objection would seem frivolous were it not supported by some adjudged cases. The great weight of authority, however, is to the contrary. In many jurisdictions, the pleadings go to the jury room, but in any event, and whether they do or not, **the court must state the issues to the jury, and these are made up of the claims of the respective parties. As a matter of law, the verdict cannot exceed the amount claimed, and it is common practice to direct the attention of the jury to that fact.** But why should the jury be influenced by the amount claimed by the plaintiff, any more than by any other claims advanced by the parties? Such claims are not evidence, and it is an insult to human intelligence to say that they are likely to mislead or otherwise influence the jury.
>
> "We find no error in the record, and the judgment is therefore affirmed."

SPECIFICATION OF ERROR NUMBER FOUR

That the trial court erred in his supplemental instructions to the jury by instructing the jury to the effect they should be convinced and decide beyond a reasonable doubt which is confusing and conflicting with his

original instructions which he gave upon the theory of preponderance of the evidence, and puts a greater burden upon appellant than the law requires.

The trial judge in his original instructions to the jury said:

"Therefore, if you find from a **preponderance of the evidence** that the defendant breached its duty to provide a seaworthy ship and appliances and that, as a result of that breach, the plaintiff suffered injury, then the defendant is liable to the plaintiff" (T. 164, 165).

"The plaintiff has the burden of proof to establish this breach of duty because the law presumes that the defendant has performed all the duties incumbent upon it, and plaintiff, in order to prevail, must establish by a **preponderance of the evidence** that the defendant has not carried out those duties. (T. 165).

"**Preponderance of the evidence** means the greater weight of the evidence. Now the greater weight of the evidence does not mean testimony by the greater number of witnesses, but it means evidence that is more convincing by reason of the credibility that you give the witnesses or by reason of other evidence that has been introduced." (T. 165).

"You have heard the evidence, and it will be up to you to determine whether the plaintiff has proved by a **preponderance of the evidence** that the defendant was

guilty of negligence in either particular, using the standard of reasonable care that I have outlined for you. (T. 167).

"The plaintiff has the burden of proving by a **preponderance of the evidence** the charges upon which he relies. However, it is not incumbent upon him to prove both of these specifications under either the theory of unseaworthiness or under the theory of negligence. If he has proved either one of them by a **preponderance of the evidence,** you will then determine whether such unseaworthiness or such negligence was a proximate cause of plaintiff's accident and injury." (T. 167).

The trial judge in his supplemental instructions (T. 187, 188) to the jury said:

"I think I told you before that I do not expect anyone to surrender an honest conviction as to the weight or effect of evidence solely because of the opinion of other jurors or solely for the purpose of returning a verdict. I do not think a person should do that; however, I think I told you just before the conclusion of my remarks that it is your duty to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but you should do so only after a consideration of the evidence with your fellow jurors, and in the course of your deliberations you should not hesitate to change your

opinion when convinced that it is erroneous. In order to bring twelve minds to a unanimous result, you must examine the questions submitted to you with candor and frankness and with proper deference to, and regard for the opinions of the other jurors. That is to say, in conferring together each of you should pay due attention and respect to the view of others and listen to each other's arguments with a disposition to re-examine your own views. If much the greater number of you are for the plaintiff, each dissenting juror ought to consider whether a doubt in his or her mind is a reasonable one since it makes no effective impression upon the minds of so many equally honest, equally intelligent jurors who bear the same responsibility, serve under the same sanction of the same oath, and have heard the same evidence with the same attention, with an equal desire to arrive at the verdict.

"On the other hand, if a majority or even a lesser number are for the defendant, other jurors ought to consider, to ask themselves again whether they have reason to doubt the correctness of a judgment which is not concurred in by many of their fellow jurors and whether they should not distrust the weight or sufficiency of evidence which fails to convince the minds of several of their fellows beyond a reasonable doubt." (T. 188).

ARGUMENT

In **Williams v. Portland General Electric Co.** (1952)

195 Or. 597, 247 P. 2d 494, in a case for damages for death under the Oregon Employers Liability Act, the trial judge gave misleading and inconsistent instructions to the jury, which brought in a verdict for the defendant. The trial judge set aside the verdict and judgment entered thereon and allowed a new trial, and the defendant appealed.

The Oregon Supreme Court, in its opinion, 195 Or. 610, says:

"Misleading and inconsistent instructions are frequently deemed ground for new trials or reversals. * * * (citing many cases).

Continuing, the court further says:

"The parties to any jury case are entitled to have the jury instructed in the law which governs the case in plain, clear, simple language. The objective of the mold, framework and language of the instructions should be to enlighten and to acquaint the jury with the applicable law. Everything which is reasonably capable of confusing or misleading the jury should be avoided. Instructions which mislead or confuse are ground for a reversal or a new trial. * * * For the reasons above stated, the challenged order of the Circuit Court is affirmed."

Eid v. Larson, et ux., (1953) 200 Or. 83, 264 P. 2d 1051, was an action by a passenger in an automobile

for personal injuries sustained in a collision. The jury returned a verdict for the defendants, and a judgment was entered for defendants. The plaintiff appealed.

The trial judge erroneously instructed the jury that plaintiff could not recover if the driver of the automobile in which she was riding was negligent. Such an instruction went directly to the question of defendant's liability. In another part of the instructions the trial judge correctly instructed the jury that the negligence of the driver of the car could not be charged to plaintiff.

The Oregon Supreme Caurt, in its opinion, at page 86, says:

> "The instruction to which exception was taken and the instruction last referred to were inconsistent. Generally, inconsistent instructions require a reversal. * * * Since the erroneous instruction went directly to the question of defendant's liability, the error cannot be disregarded. * * *"
>
> "Counsel clearly made the point of his exception when he said that the instruction was contrary to the law because 'Ellen Eid is not chargeable with any negligence of Arlie (the driver)." Reversed.

In **Rea v. Missouri ex rel Hayes,** 17 Wall 532, 21 L. Ed. 707, the Supreme Court held that instructions of the lower court, which were calculated to mislead the jury as to the character of the evidence necessary to make out the charge of fraud and to prove the issue

on the part of the defendant, were erroneous, and reversed the judgment and ordered a new trial.

In **Deserant v. Cerillos Coal Railroad Co.,** 178 U.S. 409, 20 S.Ct. 967, 44 L.Ed. 1127, the court holds that instructions as to the duty of a mine owner with respect to ventilation of the mine and keeping it clear from standing gas are erroneous, when they are so inconsistent with other instructions that they tend to confusion and misapprehension, and then make his duty **relative instead of absolute,** as required by the Act of Congress of March 3, 1891, **making the test what a reasonable person would do, instead of the command of the statute.** The court then reversed the judgment based upon a verdict, and remanded the case for a new trial.

In **Kempf v. Himsel,** 98 N.E. 2d 200, 212, 121 Ind. App. 488, the court explains that the term "beyond a reasonable doubt" in a criminal case and a "fair preponderance of evidence" in a civil case are wholly different and recognize distinguishable degrees of burdens of proof, and the duty of establishing a fact "beyond a reasonable doubt" imposes a duty far greater than to establish the same fact by a fair preponderance.

In a case decided by this Court of Appeals in 1943, **Northwestern Electric Co. v. Federal Power Commission,** 134 F. 2d 740 at 743, from the opinion, this court says:

"(2) 'Burden of proof' in the sense of 'persuasion' is meaningless unless it is also said how strongly a person must be persuaded. For example, if it is said that a person must be persuaded by not less than a 'preponderance of evidence,' it is meant that such evidence is 'evidence of greater convincing force.' * * * In criminal cases, proof of guilt must be 'beyond a reasonable doubt,' which implies a still greater degree of proof. It is one thing to be merely convinced of a fact, and another to be convinced beyond a reasonable doubt."

SPECIFICATION OF ERROR NUMBER FIVE

A. That the trial court erred in his supplemental instructions to the jury by incorrectly stating the law as to the test of seaworthiness by instructing as follows:

"The test of seaworthiness is not perfection but what a reasonably prudent person would have done under all the circumstances." (T. 191).

B. Such instruction is also confusing and conflicting with the Court's original instructions which he gave regarding seaworthiness and a test for seaworthiness. (T. 191, 163, 164).

In his original instructions (T. 163, 164, 165) the trial judge told the jury:

"I instruct you that it was the defendant's duty as the operator of said vessel to furnish plaintiff with a seaworthy vessel and safe and proper appliances in good order and condition. This duty which was imposed upon the defendant was not

delegable. In other words, this duty cannot be passed on by contract, or any other method, and merely because Oregon Stevedoring Company was charged with the responsibility of loading the vessel does not relieve the defendant of its obligation to furnish a seaworthy vessel with safe and proper appliances in good order and condition. Likewise, knowledge or due diligence on the part of the defendant is immaterial in so far as seaworthiness is concerned for a ship is under the absolute duty to furnish a seaworthy ship and appliances, but a seaworthy ship and appliances does not mean that the defendant was required to furnish a perfect ship or perfect appliances, for the standard of seaworthiness is not perfection but reasonable fitness.

"With reference to the first claim of unseaworthiness, in which it is claimed that the ship permitted the use of an unsafe and unseaworthy dolly, you have heard the evidence and I have already instructed you that it was the responsibility of the defendant to furnish a seaworthy ship with safe and proper appliances which were in good order and condition. You have heard the testimony and the other evidence, and I leave it to you to determine whether plaintiff has proved by a preponderance of the evidence that the dolly upon which the crate of glass was placed was in an un--seaworthy condition. That is the burden of the plaintiff. He must show that the dolly in question was unsafe and unseaworthy.

"With reference to the claim that too much cargo was unloaded from one part of the ship, and as a result the ship was caused to lurch, careen, tilt, slant, lean and heel over, you are instructed

that a test as to seaworthiness is whether in hull and gear the particular vessel was reasonably fit for the purposes of her voyage at that particular time.

"Therefore, if you find from a preponderance of the evidence that the defendant breached its duty to provide a seaworthy ship and appliances and that, as a result of that breach, the plaintiff suffered injury, then the defendant is liable to the plaintiff."

ARGUMENT

As set out in subdivision A of this specification of error, the trial judge was in error as to the test for seaworthiness he gave the jury in his supplemental instructions as stated **because he included the element of negligence in such test as to what a reasonably prudent person would have done under all the circumstances.**

In **Seas Shipping Co. v. Sieracki,** which involved personal injuries to a stevedore, 328 U.S. 85, 90 L.Ed. 1099, 66 S.Ct. 872, the Supreme Court holds that **"unseaworthiness is a species of * * * liability without fault,** which is different than negligence." The Sieracki case was reaffirmed again in **Pope & Talbot, Inc. v. Hawn,** 346 U.S. 406, 98 L.Ed. 143, 74 S.Ct. 202. **Petterson v. Alaska S. S. Co.,** (9th Cir.) 205 F. 2d 478, 347 U.S. 396, 98 L.Ed. 798, 74 S.Ct. 601 is to the same effect.

The case of **Deserant v. Cerillos Coal Railroad Co.,** 178 U.S. 409, 20 S.Ct. 967, 44 L.Ed. 1127, supra, which

is referred to in Specification of Error Number Four, is also very pertinent to the proposition involved under Subdivision A of this Specification of Error for the reason that in the Deserant case, the trial judge erroneously instructed the jury as to the duty of a mine owner with respect to ventilation of the mine and keeping it clear from standing gas in such a way as to be inconsistent with other instructions of the court so that all the instructions tended to confusion and misapprehension and also made the duty of the mine owner relative instead of absolute as required by the Act of Congress involved, thus making the test of what a reasonable person would do instead of the command of the statute. The Supreme Court reversed the lower court and remanded the case for a new trial.

Moreover, as pointed out in subdivision B of this particular specification of error number five, such an instruction is also confusing and conflicting with the trial judge's original instructions that he gave regarding seaworthiness and a test for seaworthiness.

Such a confusing and conflicting instruction is prejudicial error and ground for reversal, as pointed out in appellant's argument under Specification of Error Number Four in this brief, which we adopt and refer to under this specification of error for the sake of brevity.

CONCLUSION

In conclusion, it is submitted that the trial court erred with respect to each specification of error presented herein, and to expedite matters, that this Court of Appeals should determine as a matter of law that appellee is guilty of negligence and unseaworthiness as charged by appellant.

The recent case of **Johnson Line v. Maloney,** 9th Cir., April 9, 1957, 243 F 2d 293, illustrates the proposition that where the complaint alleged both unseaworthiness of the vessel and negligence on the part of the defendant (and an unsafe place to work, as in the case at bar) that the court would be warranted in finding against the ship on grounds of either negligence or of unseaworthiness or of both. This Court of Appeals went on to say in its opinion, in referring to another case, that the shipowner owed not only the duty to provide a seaworthy ship in which the stevedore might work, but it owed him as a business visitor or invitee the duty to provide a reasonably safe place to do his work. "This duty," said the court, "is nondelegable." (243 F 2d 293, at 294).

This case should then be reversed and remanded for a new trial only for the purpose of determining the amount of damages sustained by appellant resulting from the accident involved in this case, or if this Court

of Appeals decides that it cannot follow the foregoing procedure, then that the judgment appealed from should be reversed and this case remanded for a new trial in all respects, with costs to appellant in both courts.

Respectfully submitted,

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